IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Nova Scotia (Minister of Community Services) v. L. W., 2006 NSSC 244

Date: 20060803
Docket: SFH CFSA 037883
Registry: Halifax

Between: Minister of Community Services

Applicant

v.

W. (L.)

Respondent

v.

C. (C.) & C. (E.)

Third Parties

Editorial Notice: Identifying information has been removed from this electronic version of the judgment.

Judge: The Honourable Justice Beryl MacDonald

Heard: July 24, 2006, in Halifax, Nova Scotia

Oral Decision: July 28, 2006

Written Decision: August 3, 2006

Counsel: John Underhill, for the Applicant
Charlene Moore, for the Respondent

Terry Sheppard, for the Third Parties
Patrick Eagan, for the Foster Parents

By the Court:

[1] After rendering an oral decision in this matter counsel for the Minister requested a copy of this decision because of the uniqueness of some of the legal issues raised in this proceeding. I have edited that oral decision to correct grammatical errors and to expand upon my reasoning for further clarification.

[2] This is an application made by the Foster Parents of the male child J. W. This child has been in their care since February 2005. He is two years old. The final disposition of this proceeding must occur on or before August 28th, 2006 . The Foster Parents have made an application pursuant to section 36 (4) of the Children and Family Services Act S.N.S. 1990, c.5 to become active participants in that final disposition hearing to the same extent as could a party to a proceeding. They request the right to give evidence and call witnesses, the right to cross examine witnesses, and the right to receive assessment reports and other documentation. They have also commenced an application for a judicial review with a request I use my parens patriae jurisdiction to grant them the remedy they seek which is to prevent the removal of J. W. from their home.

[3] Although the application for a judicial review has not been filed and served upon the parties within the time necessary to be heard before me today, I have decided to make a decision in respect to this application now rather than wait for the matter to return again before me. The parties need these applications to be dealt with now so that preparation can be made for the final hearing. All will need to know what the involvement of the Foster Parents will be during that hearing and the nature of the remedy that may be granted to them.

[4] In preparing my decision I have reviewed all the material provided to me by each of the parties and by the Foster Parents. I have reviewed the assessment reports in the file. I have reviewed the protection application and the subsequent affidavits filed at the time of each disposition review. I have considered the case law and legal submissions provided by counsel.

[5] The first question to be answered is whether Foster Parents, at a final disposition stage, have any standing or legal right to participate in this proceeding for the purpose of introducing or eliciting evidence and providing submissions about what is in the child's best interest should the child come into the permanent care of the Minister. In this case the Minister is seeking permanent care. The plan for the child is that he will eventually be placed in the home of the child's paternal Aunt and Uncle. The Mother of this child is prepared to accept that her son will be in permanent care if he is placed with his Aunt and Uncle. If the child is not to be placed with the Aunt and Uncle she will request that he be returned to her care.

[6] The Foster Parents had previously brought an application to this court requesting that they be joined as parties to this proceeding. That application was heard by Justice Williams and was denied. Counsel for the agency has suggested the present application pursuant to section 36(4) is res judicata because:

- it should have been brought as an alternative application in the previous proceeding;

- the facts upon which this application is based are virtually the same facts upon which the prior application was based and was subsequently dismissed.

[7] I have reviewed Justice Williams' decision and note the following comment:

> The Foster Parents have a remedy in this process under a section 36 (4) of the Children and Family Services Act. It may be that they did not receive notice of some previous disposition reviews, but they most certainly will have notice of the coming disposition review. It is open to Mr. E. at that disposition review, in my view, to be present, to make submissions to the court. Those submissions may include requesting that his clients take part in the hearing to some degree as is contemplated by the last phrases in section 36 (4)..... it may be that they will ask to elevate their involvement under these provisions or later on an application to terminate.

[8] It appears that Justice Williams did not consider his decision would prevent a future application pursuant to section 36(4). His comments are not binding upon me in considering the issue of res judicata but I do agree that section 36(4) contemplates that a Foster Parent may request involvement at any review. This is a

statutory right given to Foster Parents. Under these circumstances I do not consider their present application to be res judicata.

[9] The Foster Parents support the Minister's recommendation that the child be placed in the permanent care of the Minister. However they do not agree with the Minister's plan of care. They want to provide evidence and submissions to this court arguing that it is not in this child's best interest to be removed from their home and placed in the care of the child's Uncle and Aunt. This is the same purpose for which they filed their previous application to be added as a party to these proceedings.

[10] In their appearance before Justice Williams he commented upon the purpose for their request to be added as parties and decided that if Foster Parents were permitted participation in this proceeding for that purpose it would put them in conflict both with the Minister and with the Mother of this child. Justice Williams approved submissions made by the Mother's counsel suggesting that a parent should not have to negotiate with, litigate against, or deal with Foster Parents when putting together a plan for the future care of their children whether that plan be a personal plan or a placement with extended family. Justice Williams' decision clearly indicates that a Foster Parent should not be added as a party to protection proceedings when the purpose of their addition is to permit them to set up a plan for the child's care contrary to that proposed by the Minister and the child's parents. He quoted from *Children's Aid Society of Shelburne County v. I. C.* [2001] N.S.J. No 260 (N.S.C.A.) a case in which the Court of Appeal decided that foster parents are not be considered for custody until removal from the family has been justified and an award for permanent care to an agency is made. The reference in this case to family also included extended family members. Only after a return to the child's biological parents or a placement with extended family members has been determined inadequate may a foster family be considered for custody of the child. If this were not the case there would be no substance to the principles of family integrity, rehabilitation, nor to priorities for family placements. . Although the Uncle and Aunt are unknown to this child, they do fall within the definition of an extended family placement and these placements are to be given priority when an agency considers its plan of care for a child.

[11] In *Children's Aid Society of Metropolitan Toronto v. SD* , [1991] O. J. No. 1384, a similar decision was made and at page 6 the judge commented:

> "When permanent wardship is ordered, the hope of reconciliation has been abandoned and the interests of the family and extended family have been dealt with, the foster parents are not only free to apply for permanent care of the child but are usually welcomed in that respect due to among other advantages, to the chance of continuity for the child."

[12] As a result it would appear that after a child has been placed in the permanent care of an agency a Foster Parent may have standing to object to a removal of that child from that Foster Parent's care. In this case the child is not in permanent care.

[13] Although Justice Williams' decision related to the Foster Parents' request to be added as a party to these proceedings, I find his decision and the cases upon which he relied to be equally relevant the application before me. The purpose for this application is the same. While it may be procedurally awkward, the law in Nova Scotia appears to limit a foster parent's participation in protection proceedings until after a permanent care award has been made. Their involvement must therefore also be limited when they participate in a proceeding by virtue of the provisions of section 36(4). However, this section does not define the nature or extent of permissible participation. No reported decision has been found considering these provisions in Nova Scotia. The *Shelbourne* case would suggest section 36(4) cannot be used to give the same right of participation as is given to a party in the proceeding.

[14] Rollie Thompson, in "The Annotated Children And Family Services Act" , August 1991, in considering this section states:

> "...s. 36(4) does not confer "party" status upon the foster parent, but something more akin to an "intervener" status..... there are a number of situations when it can be envisioned that a longer- term foster parent may wish to attend and play a role in the proceeding. First, a foster parent may be fostering with a view to adoption and, as a proceeding moves toward permanent care and custody, may wish to have a voice at the hearing. Second, long-term foster parents may wish to participate on an application to terminate permanent care and custody, which obviously has significant implications for their continuing relationship with the child. Third, the granting and variation of access under a permanent care and custody order plainly can affect the lives of foster parents. Fourth, in some instances, largely for financial reasons, a relative or community member may become a special-purpose foster parent, with the child placed with them through

> agency care and custody rather than through a supervision order to a non-parent. Finally, there simply may emerge a difference of opinion between foster parent and agency and the foster parents may want to present a view on his or her own."

[15] Counsel for the Mother referred to an unreported case from Ontario, *John and Jane Doe v. Sherri K.* (August 25, 1994), Brockville 33/90, Masse J. (Ont. Prov. Div.) found in Bernstein, Bernstein, Kirwin, *Child Protection Law in Canada.* In that case the foster parents, who had the care of a child for a period of 20 months, applied for standing in the proceeding, or in the alternative, sought intervener status as persons with an interest in the result. Party status was denied but the foster parents were permitted to participate by calling evidence and cross-examining witnesses with respect to the child's progress and development while in their care, with respect to their suitability as a possible placement for the child on disposition, and they were to be given documentary material from the society's file relating to that particular child.

[16] The decision in *Children's Aid Society of Metropolitan Toronto v. B.(T.)*, 2003 CarswellOnt 136, provides useful assistance, even though it involved an application commenced by foster parents to be added as parties to a child protection proceeding. At paragraph 47 the following appears:

> "All of this leads me to the following conclusions and decision:
>
> i) The Child and Family Services Act presumes a Children's Aid Society will act in a child's best interests, and because of this, societies are given considerable discretion in planning for children in their care;
>
> (ii) Any plan of care proposed by a Children's Aid Society, especially one which is not opposed by the parents, should not be interfered with or rejected by the court in the absence of compelling evidence;
>
> (iii) A court should not be bound to find the best possible care for a child in child protection proceedings. Rather the test should be whether the preferred class of caregivers described in the statute, namely family members, can provide adequate care which will be consistent with the child's best interests;
>
> (iv) In determining whether a proposed plan of care would be in the child's best interests, the length of time the child has been in the care of foster parents, the relationship there may be between the child and those foster parents, and the effect

> on the child of disrupting that relationship are all factors which a court may and should consider.

I find these comments applicable to the scheme and intent of the Children and Family Services Act.

[17] The Children and Family Services Act, requires all actions and decisions taken pursuant to its provisions to be examined through the prism of what is in the child's best interest. At a review hearing the Court is not to be merely a rubber stamp in approving disposition requests. It must independently evaluate what is in the child's best interest and not merely be bound by what an Agency and other parties believe to be in the child's best interest. However, courts have been directed to recognize that the legislature has given the Minister the authority to devise plans that are in the child's best interest and the Minister's decisions are to be given great respect. This court is not to impose or substitute a plan of its own, but it can, for example, decide that an important best interest issue has been overlooked and send the parties back to address that issue. As was the case in *Children's Aid Society of Metropolitan Toronto v. B.(T.),* this court "has no specific statutory authority to prescribe the nature of the child's placement, to impose any conditions of care on the Society, other than terms of access, or to fetter the Society's discretion in providing care it perceives to be in the child's best interests."

[18] After considering all of the material before me, I have decided that foster parents may participate at a review hearing to make submissions on any significant issue relating to the child's best interest about which they have personal information. They cannot present a different plan of care, but they can raise issues to assist the Court in determining whether the child's best interest is being met by the various dispositions presented to the court. Depending on the nature of the Foster Parents information they may present it by way of personal testimony, cross-examination of witnesses, and submissions. In an appropriate case they may also be provided documentary information about the child contained in an Agency's file. Having decided the extent of involvement a Foster Parent may have in a proceeding I now must determine whether these Foster Parents are to have the same or a more limited involvement in this proceeding.

[19] It is known that the Foster Parents do not consider it to be in J. W.'s best interest to remove him from their care. They argue that he is firmly attached to them

and they are his psychological parents. They believe that if he is removed from their care he will suffer emotional harm. They want to participate in the review hearing to convince the presiding justice that the best interest of this child is not being met by the Minister's plan. The essential difficulty in this proceeding is that the Children and Family Services Act does not give the court authority to direct the Minister to place the child in a particular home if the child is to be in the permanent care of the Minister. In addition, because of section 45 of the Children and Family Services Act the only order a court now has jurisdiction to grant is an order for permanent care or an order to dismiss the proceeding. There is no time left for any of the other orders usually available to the court upon disposition.

[20] The Foster Parents have argued that I am able to grant an order for permanent care to the Minister with a requirement that J. W. not be removed from their care by exercising my parens patriae jurisdiction. This was the reason why they have filed their application for judicial review.

[21] In *Benson and Benson v. Director of Child Welfare for Newfoundland*, [1982] 2 S.C.R. 716 the court was asked to consider exercising its parens patriae jurisdiction in an adoption proceeding. Wilson J. after reviewing a decision of the House of Lords in *A.v. Liverpool City Council*, [1981] 2 All E.R. 385 summarized the decision in that case as follows:

> "It would seem then that in England the wardship jurisdiction of the court (parens patriae) has not been ousted by the existence of legislation entrusting the care and custody of children to local authorities. It is, however, confined to "**gaps" in the legislation and to judicial review."**

[22] In her decision Wilson, J did find that there was a legislative gap and that she could have also proceeded with a judicial review of the Director's decision because of a failure to treat the applicant's fairly.

[23] This case was also relied upon in *G.(C.) v. Catholic Children's Aid Society of Hamilton- Wentworth*, 1998 CarswellOnt 2578 (Ont. CA), a case in which the Ontario Court of Appeal concluded that a superior court will exercise its parens partiae jurisdiction by way of judicial review in the proper case.

[24] In reviewing the facts in the cases where the parens patriae jurisdiction has been exercised I find they are quite different from those before me. In those cases there were significant defaults and procedural unfairness such as exceeding specific time limitations specified in legislation, failing to consider specific directions in legislation to consider the continuity of care provided by foster parents as a significant issue in respect to the child's best interest mitigating against removal from their care, planning to place a child who was in permanent care with the foster parents with whom she had lived for two years and then changing that plan to instead place the child with virtual strangers.

[25] The Children and Family Services Act gives the Minister the decision making authority to determine what is in a child's best interest. I am directed to give those decisions great deference and not to substitute my plan for the plan of the Minister. However, I find I could act and exercise a parens patriae jurisdiction if the Minister had not, for example, considered the child's bond with the Foster Parents and how that should be managed in the transfer of care. This is an issue effecting the child's best interest. In this case the Agency has clearly carefully considered this issue. It was not and will not be ignored. In addition, it is important to recognize that the Minister is acting within the time lines set out in our legislation. Therefore this child has been in foster care for a time period contemplated by the legislation. This child is not yet in permanent care. Finally there has been no procedural unfairness towards the Foster Parents.

[26] Every child subject to a protection proceeding will form an attachment to his or her foster family. This is expected. If children could not be removed from foster families within the timelines contemplated by the legislation the overall objectives of the legislation could be undermined. I can find no juristic reason to exercise a parens patriae jurisdiction in this case. The Foster Parents application for a judicial review is dismissed.

[27] The Foster Parents may participate in the upcoming review hearing by their personal attendance and the attendance of their counsel who may make submissions on their behalf. Because of this decision, I have disposed of the only "best interest" issue they have raised with the court. However, they may have questions about the transition planning for the removal of the child that the Justice hearing the matter should consider. There may be an intervening circumstance upon which they might wish to make representations. Whether they attend will of course be their decision.

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Beryl MacDonald, J.